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Ontario Human Rights Commission Policy Statement with Respect to Exclusionary Scholarships

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PLEASE NOTE

This policy reflects the Commission's interpretation of the relevant sections of the Code. It is subject to interpretation by boards of inquiry and the courts, and should be read in conjunction with the specific provisions of the Code. Any questions about the policy may be directed to the staff of the Ontario Human Rights Commission.

POLICY WITH RESPECT TO EXCLUSIONARY SCHOLARSHIPS

INTRODUCTION

Private scholarships and academic awards have traditionally been developed by benefactors, community organizations and other interest groups to reward or promote members of their "community". Eligibility has been restricted to members of the designated community, resulting in the exclusion of all other potential applicants. Until recently, public awareness of and sensitivity to human rights considerations had not progressed to the point where it could be seen that the promotion of advantage for some groups may operate to reinforce the disadvantage of others. Although many of these exclusionary scholarships were established for positive reasons with no intention to discriminate, it has become evident that restrictive eligibility criteria have resulted in continuing disadvantage for members of non-preferred groups, many of whom experience fewer educational opportunities than the groups whose members are the traditional recipients of such scholarships. For example, many new Canadians lack the degree of community organization necessary to finance and establish student awards. Other disadvantaged minority groups, such as the disabled community, have scarcely benefitted from exclusionary scholarships because so few benefactors have established funds for them.

Many scholarships, bursaries and other financial awards specify eligibility criteria that conflict with the Human Rights Code. The monetary value of these scholarships is

significant. Further, a person who has received a scholarship or academic award will have an advantage in seeking employment or access to post-graduate or professional training. Therefore, the lack of opportunity to compete for such assistance is a significant disadvantage.

In response to concerns raised by the community and in order to assist both potential applicants as well as sponsoring organizations, the Commission has set out its view as to the applicability of the provisions of the *Code* to exclusionary scholarships and educational grants.

STATEMENT OF POLICY

Although the validity of scholarships must be determined on a case-by-case basis, it is the Commission's view that eligibility for scholarships and other similar academic awards should not, as a rule, be restricted by race, gender, ethnic origin, age or any of the grounds designated under the *Code*. Rather, the Commission believes that scholarships and awards should be awarded on the basis of objective criteria such as academic merit, course specialization and/or personal financial need.

Scholarships and other similar awards, can however, be restricted on the basis of membership in a group designated under the

Code if the purpose of such a restriction is to relieve hardship or economic disadvantage. The basis for this position is discussed below.

APPLICABLE CODE PROVISIONS

Section 1 of the *Code* provides that every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Section 8 provides that no person shall infringe or do, directly or indirectly, anything that infringes a right to equal treatment.

Education is a "service" within the meaning of section 1 of the *Code*; exclusionary scholarships, which are defined as those with discriminatory eligibility criteria, indirectly affect access to higher education and are thus contrary to the *Code*.

The Commission's policy allows for three exceptions, which are set out below:

(a) Special Programs:

If the scholarship constitutes or is part of a special affirmative action program , as defined in subsection 13(1) of the *Code*, it would survive a challenge to eligibility criteria that restrict the award to members of a disadvantaged group.

Section 13 provides that it is not a contravention of the *Code* to implement a special program which targets a particular group where the program is "designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups

to achieve or attempt to achieve equal opportunity, or that is likely to contribute to the elimination of the infringement of rights under Part I." (i.e. elimination of discrimination).

An applicant's eligibility for a scholarship or other similar benefit should not be measured in terms of membership in a designated class under the *Code*, such as race, gender or religion, unless the requirements of subsection 13(1) are satisfied. The Commission's Guidelines on Special Programs* specify that a special program should be based on clearly articulated reasons why the designated groups are considered to be experiencing hardship or disadvantage. In addition, a special program should contain a clear statement as to how the target group will be assisted.

Some scholarships are restricted to particular groups on the unsubstantiated assumption that most of the group's members are disadvantaged. A number of scholarships are awarded to "mature students", for example, who are defined by many educational institutions as persons over 25 years of age. Others are limited to "married students." There are wide variations in financial need among various members of our society which are often not linked to their age or marital status. The Commission is, therefore, of the view that it is more appropriate for awards to be

* The Commission's Guidelines on Special Programs are available at any Commission office.

granted only when a condition of disadvantage can be demonstrated by objective and, where possible, quantifiable evidence.

Indeed, the Court of Appeal* has stated that exclusionary scholarships must be evaluated on a case by case basis to determine if the particular restrictions which apply in each are contrary to public policy as discriminatory. Such an analysis must take into account the social and historical context of the preferred group, as well as the effect of the restrictions on, for example, racial, religious, gender, and ethnic equality. The court affirmed the importance of special programs in noting that not all exclusionary clauses will violate public policy, just as not all instances of unequal treatment constitute discrimination. A scholarship fund established to promote the education of aboriginal people, persons with disabilities, women (particularly racial minority women, recent immigrants and women with disabilities) would not be held to be contrary to public policy. A sponsoring organization or benefactor would probably have little difficulty establishing that a scholarship which is restricted to members of these groups is not discriminatory. However, these restrictions can be contrasted with the exclusionary terms of the scholarship which was considered by the Court of Appeal in the Canada Trust case. The scholarship restricted eligibility to economically disadvantaged white Christians. The Court struck down the exclusionary terms as contrary to the public policy of racial equality. In considering whether or not a particular scholarship is in contravention of public policy or the *Code*, the question of

whether or not it benefits a group which has been historically disadvantaged in the larger social and political context, and in comparison with other potential applicants, will be paramount.

It is the Commission's position that many of the scholarships designating a specific cultural minority do not qualify as special programs. Indeed, many universities and colleges refuse to administer awards that specify ethnic origin where the group has not been determined to be disadvantaged, and most benefactors have changed their eligibility criteria accordingly. Many such awards are now granted according to merit, ability and potential within a particular field of study. For example, it would be legitimate for a bursary or scholarship to be restricted to a student in Italian Studies, or for a fund to be awarded on the basis of a significant cultural contribution within the Jewish community, as long as it was not a requirement that the recipient be Italian or Jewish.

Further, in the light of the direction from the Court of Appeal that it is necessary to consider the impact of scholarship restrictions on overall equality, institutions such as universities which offer a number of scholarships should attempt to achieve an overall balance in eligibility. For example, if a particular program has a number of scholarships for women, and none for

* In the Canada Trust Company and Ontario Human Rights Commission and Royal Ontario Museum et al (Court of Appeal, April 24, 1990)

persons with disabilities, the university may wish to try to attract a benefactor for this group, or may establish an award from its own resources.

(b) Special Interest Organizations:

A number of benefactors and scholarship-granting organizations have inquired as to whether section 17 of the *Code* applies to their particular circumstances, and whether that section would allow them to restrict scholarships and other awards to members of groups that are designated under the *Code*. It is therefore important to clarify the application of section 17 to situations involving scholarships and awards.

Section 17 of the *Code* provides that there is no infringement of a right to equal treatment if a religious, philanthropic, educational, fraternal or social institution or organization which primarily serves the interests of a particular group restricts membership or participation to members of that group.

In the event that a specific organization comes within section 17, it is likely that in most circumstances it will be unable to restrict eligibility for scholarships and awards on the basis of the characteristics of the group it serves (e.g. gender-related or ethnic groups), as the receipt of a scholarship cannot be said to constitute "membership or participation" in a special interest organization. Even if an award-granting organization were structured in such a way as to appear to come within section 17, exclusionary scholarships which discriminate in favour of non-disadvantaged

groups would remain vulnerable to challenge under the *Code*.

On the other hand, if an institution providing religious education falls within the language of section 17, the Commission is of the view that it would be reasonable to allow that institution to restrict its own scholarship to members of the group whose interests it serves. It would be acceptable, for example, for a Roman Catholic institution to restrict its theological awards, on the basis of creed, to Roman Catholics who intend to study for the priesthood, or for a Jewish Hebrew school to declare only Jewish students to be eligible for enrolment. Moreover, such a school may designate scholarships or other financial awards strictly for Jewish applicants.

(c) Scholarships as an Employment Benefit:

In addition to scholarships established as a special program under section 13 of the *Code* and those offered by a religious educational organization to its own members, there is a third circumstance under which an exclusionary scholarship may not conflict with the *Code*.

Educational subsidies offered by employers to employees and their families, although restricted by family status, are acceptable as consistent with the principle set out in clause 23(1)(d) of the *Code*. That clause provides that an employer may grant employment or advancement in employment to a child, spouse or parent of an employee. Educational subsidies offered to the families of employees are acceptable to the Commission as a legitimate and non-discriminatory exclusion.

CONCLUSION

Scholarships and other educational awards affect access to education, a service within the meaning of the *Code*. A reference to a scholarship or award on a resumé will be of benefit to a person seeking employment or access to further education or training. For this reason, scholarships which restrict eligibility on the basis of the prohibited grounds in the Human Rights Code are not permissible unless the scholarship:

- qualifies as a special program pursuant to subsection 13(1),
- is awarded by a religious educational organization to a member,
- is designed as an employment benefit to subsidize the education of the children or spouses of employees.



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